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Supreme Court of the United States

OCTOBER TERM, 1943.

No. 103.

RALPH REA, ET AL.,
Petitioners,

vs.

WILLIAM B. DEVANNEY, ET AL.,
Respondents.

REPLY BRIEF OF PETITIONERS.

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JURISDICTION AND THE EXISTENCE AND DENIAL OF A SUBSTANTIAL FEDERAL QUESTION.

Respondents do not contend, but in substance admit that federal questions were raised and denied, in the state courts, as contended by petitioners. They merely contend that the questions are without substance.

They do not question the jurisdiction of this Honorable Court, on the record directly. If they do, it is only by indirection.

They do not attempt to aid the court by answering
explaining the applicable decision of this honorab
Court, as cited by petitioners.

This court has repeatedly declared that what is fu
faith and credit and what its extent is, is a question to
decided by this court.

This court has repeatedly decided that what cons
tutes due process is to be determined by this court wh
a federal question has been set up and denied.

In the state courts, respondents strenuously contend
that Grace Backenstoe and M. P. Murnan were marri
by a ceremonial marriage as provided by the laws of t
state of Arizona, in July, 1915, but now well knowi
that an examination of the record of this alleged ce
monial marriage will disclose that there never was a
marriage; that there is nothing to corroborate; that
license was ever issued and that therefore the judgm
of the state courts does violence to the constitutional
quirement that every state shall give full faith and cre
to the public acts and records of every other state
that:

> "A finding that the ceremonial marriage in A
> zona in 1915 was valid, was not necessary to
> Court of Appeals conclusion." (Respondents' br
> page 28.)

Obviously this statement is made in order to minim
the federal question involved, but respondents overl
the fact that unless there was a valid ceremonial m
riage under the laws of Arizona in 1915, their whole
falls and as a matter of fact Judge Barnes who wrote
opinion of the Court of Appeals based his whole opi
upon this fact, as follows:

"(The Law of Marriage.)

We start with the well-recognized principle that the lex loci is controlling on marriage contracts as well as all others. Under the laws of Arizona common law marriages are not recognized. Under the situation in the instant case it is our judgment that the marriage of Pat and Grace must be based on the proof of a ceremonial marriage or none at all." (Respondents' brief, page 61.)

Judge Geiger, who relies on a common law marriage, established as he says by holding out and reputation after 1919, uses that finding to say that it **"might"** corroborate a ceremonial marriage. To justify this statement he relies on Johnson v. Wolford, 117 O. S., 136, wherein the evidence is undisputed that all of the statutory requirements were complied with, followed by immediate and continuous cohabitation and the birth of a child, but because one of the parties was married and the other spouse subsequently died, the court held that after the death of such other spouse and the continued cohabitation of the parties who went through such irregular ceremonial marriage, that the subsequent holding out, cohabitation and reputation were sufficient to establish a valid marriage. **That is nothing like this case.**

Here there are illicit relations established; no proof of a valid statutory marriage; a separation after the alleged marriage and **for approximately four years each of the parties by documents represented themselves to be single and unmarried**; a deliberate, admitted concealment from the public; no children and none of the elements set forth in the case of Johnson v. Wolford, supra.

It is therefore evident the issues do depend entirely on a valid statutory marriage in Arizona.

The judgment entry, which contains the final draft of the findings of fact modifying as the court states therein, its former findings made by the court is as follows:

> "13. The marriage records in the Supreme Court for Coconino county, Arizona, fail to show that any marriage license was ever issued to Pat Murnan or Grace Daugherty. There is no record of said marriage in the office of the clerk of the Superior Court of said Coconino county, but the absence of said record may be accounted for by the failure of the justice or the parties to return the license and a certificate of the solemnization of the marriage to the said clerk of courts, or the failure of the clerk to make a record thereof, upon the return of said license." (Paragraph 13, Judgment Entry, Appendix.)

If the ceremonial marriage claimed to have been performed at Flagstaff, Arizona, in 1915, is to be abandoned, then under the testimony of Grace Backenstoe, while she was alive that:

> "There was no other marriage than the ceremonial marriage at Flagstaff." (Respondents' printed brief, page 70.)

the whole case of respondents falls.

Now in order to sustain this alleged ceremonial marriage, which counsel now say was not necessary, the Court of Appeals finds that there is no record of said marriage in the office of the clerk, "but that the absence of said record **may be** accounted for by the failure of"

(1) the justice of the peace? or

(2) the parties? or

(3) the clerk?

to do or not to do certain things.

In the opinion of Judge Barnes, he says:

> "This failure **might be** wilful or accidental." (Respondents' brief, page 54.)

There is no finding by the court as such as to who issued such license, when such license was issued, and where it was issued, to whom it was issued, what its form or contents are or were, because there was no testimony or evidence of such, merely hearsay and self-serving declarations of some third person. No authenticated essential document or its contents produced. Grace Backenstoe testified while alive she never had any. **Barnes alone** made a finding that a license was issued but he and the court refused to answer the interrogatories, the answer to which would have established the probative facts from which the ultimate fact of a marriage could only have been determined and found and which would have been determinative of the issue raised by the petition in ejectment against Grace Backenstoe and her answer and the reply of the plaintiff and this would have determined what judgment could be and must be made.

What may be, might be or could be, is mere conjecture, speculation and guess work and certainly can not be recognized by a court as a basis for the alleged ceremonial marriage.

His Honor Hornbeck, judge, makes a very clear statement as to the evidence, in the record, which attempts to establish a ceremonial marriage as follows:

> "Upon the controlling question, the record presents two distinct and different periods affecting the lives and the status of the parties involved and, in my judgment, two insurmountable obstacles to the maintenance of the claim that Pat and Grace were married.
>
> The first period dates from on or about 1915 and ends in 1919. The second period begins in 1919 and ends with the taking of the deposition of Grace.

From June, 1915, the date of the alleged ceremonial marriage, until 1919, there is not one word of documentary proof tending to establish the marital relation between Pat and Grace. All of it is to the contrary. In the ordinary case this class of evidence would not be available to any considerable degree. Here we have it in abundance and it is compelling in probative effect because of the conflict and uncertainty in the word of mouth evidence. Some of the testimony in the holding out of these parties as husband and wife and especially of their living together as such, is of doubtful value. That relating to the vital question of the existence of a marriage certificate is, to say the least, not convincing. The marriage records in the court house at Flagstaff, Arizona, are of major importance, and afford no support whatever for the claim of a ceremonial marriage. **The absence of such evidence may be explained only by imputing misconduct, or gross carelessness, to officials who are charged with the duty of making and keeping these public records. Nothing in the evidence affords sufficient support for such a conclusion.**

The records at Flagstaff present the first insurmountable obstacle and preclude, without respect to the burden of proof, a finding that the parties were ceremonially married. Other difficulties of less conquence appear. For instance, during this first period, every instrument, and there are many of them (12 deeds) signed by the respective parties, wherein their marital status is set out, refutes the claim of any marriage up to 1919. (Respondents' brief, pages 72 and 73.)

Judge Hornbeck then continues to analyze the relations between the parties after 1919 and the law in Ohio in relation to common law marriages and states as follows:

"In no case has any court found a common law marriage to be proven wherein one of the parties expressly stated that no such contract of marriage existed. This brings us to the second insurmountable

obstacle in this case, namely, the statement of Grace in her deposition that there was but one marriage which was the ceremony performed in Flagstaff.

If we hold that a common law agreement to marry is established by the cohabitation and the holding out of these parties, we not only must disregard the testimony tending to establish ceremonial marriage, the most potent of which is the statement of Grace, but also find either, that she was mistaken, or misstating the truth, when she said that there was but one marriage. This can not be reconciled with the probabilities. Such an event as an agreement to marry would make such an indelible impression upon the minds of the contracting parties, especially the woman, as that they would never forget it. The situation developed by the testimony of Grace gives application to the law as announced in Dirion v. Brewer, Admr., et al., 20 O. App., 298; Holves v. Pere Marquette Rd. Co., 28 O. App., 297; Lumas v. Lumas, 26 O. App., 502; the leading case of Umbenhower v. Labus, 85 O. S., 238, and in re Estate of Redman, 135 O. S., 558, in all of which cases the court emphasized the necessity that, to constitute a common law marriage, not only must there be cohabitation as husband and wife, a holding out to the public of that relationship, but these acts must follow the agreement to marry. Re Estate of Redman, supra, has special application. The court found that there had been cohabitation between the parties, a holding out as husband and wife, but that the parties agreed that marriage not for them and that they did not desire the status. This latter fact does not appear in the instant case, **but here, as in the cited cases, the statement of one of the parties to the claimed common law marriage completely refutes the existence of one of the essential elements to its establishment."** (Respondents' brief, pages 74 and 75.)

We respectfully submit that if the issue of a ceremonial marriage under the laws of Arizona was the only question at issue, it presents a substantial federal question on

the record under the full faith and credit provision of the Constitution of the United States.

IN AN EFFORT TO DEFEAT THE CLAIMS OF PETITIONERS, THE RESPONDENTS NOW SHIFT THEIR POSITION AS TO WHAT THE ORIGINAL ACTION UNDER THE PETITION IN THE COURT OF COMMON PLEAS WAS.

The respondents finding themselves embarrassed now for the first time claim that this action is an action to quiet title. In order to justify their claim that their case was a chancery case in the Court of Appeals and triable de novo under Article IV, Section 6 (page 42 our brief), providing that chancery cases only are triable de novo in Court of Appeals. The Court of Appeals does not have jurisdiction to try any other kind of a case on appeal de novo. Therefore, the change in their position since our brief was filed. A reading of the quotation from the petition in respondents' brief, refutes this new claim of theirs, to wit:

> "That since May 12, 1937, the defendant, **Grace D. Backenstoe, who claims an interest in said premises, has been in possession thereof, collecting therefrom its rents and profits,** has failed, neglected and refused to pay over, or in any manner account therefor and has threatened to and will continue to do so, to the irreparable injury of this plaintiff, **for which he is without an adequate remedy at law.**
>
> Wherefore, plaintiff prays that he may have partition of the premises hereinbefore described, according to law; that the defendant, Grace D. Backenstoe, **be required to set up** what interest, if any, she may have, in said premises and that **the same be declared null and void;** that this plaintiff may have **an accounting** of rents and profits issuing from said premises; that a **trustee ad litem be appointed** for

> the preservation of said premises and the rents and profits issuing therefrom; and that he may have such further relief in law and in equity as the court may deem just and proper in the premises." (Respondents' brief, page 12.)

We respectfully suggest to this Honorable Court to note that **there is not one word about quieting title** in any part of the petition or the prayer thereof. The facts alleged do not give a court of equity jurisdiction to decree a quieting of title under Section 11901, General Code of Ohio, which controls such practice.

As a matter of fact respondents have misstated the Ohio law on the subject of an action to quiet title. There was and is no allegation that plaintiff and heirs of M. P. Murnan were in possession. Grace Backenstoe was at the time of the commencement of this action **in possession** of the real property, the subject of the action and she so claimed and admitted, not as a co-tenant but as **an adverse claimant to all of the real property.**

Respondents quote from the findings of fact of Judge Turner of the Common Pleas Court in their attempt to show that this was an action to quiet title, but leave out the seventh finding of fact which is as follows:

> "7. That during her lifetime and subsequent to the death of Maurice Patrick Murnan said Grace Backenstoe Murnan collected the rents and profits from the real estate described in plaintiff's petition herein. That said Grace Backenstoe cared for and maintained said real estate and paid the necessary expenses incident to the care and maintenance of said real estate." (Transcript, page 75.)

We wish to point out that at the time of the trial of this cause Grace Backenstoe had died and the court had theretofore appointed a receiver who took possession of the

real estate from the executor of Grace Backenstoe estate and the same was in the custody of the court and that as a result of the judgment of the court at law partition was then ordered.

Respondents further say that only equitable remedies were included in the journal entry but fail to emphasize that the heirs of Grace Backenstoe Murnan are enjoined from setting up any claim not only to the title to said real estate but also to the **"possession"** thereof. First line on page 15, respondents' brief.

In this connection this court should read again the third syllabus in 57 O. S., 271, Raymond v. Ry. Company.

The law in Ohio as to an action to quiet title is set forth in the following section of the General Code:

> "Special Action—Division VII. Chapter 1, Actions Relating to Realty.
>
> Section 11901. General Code, Ohio. Action to Quiet Title.
>
> An action may be brought by a person **in possession** of real property, by himself or tenant, against any person who claims an estate or interest therein, adverse to him, for the purpose of determining such adverse estate or interest; or such action may be brought by a person out of possession, having or claiming to have an estate or interest in remainder or reversion in real property, against any person who claims to have an estate or interest therein, adverse to him, for the purpose of determining the interests of the parties therein."

This section of the General Code has been in effect for more than a hundred years.

It is a part of the settled course of judicial proceedings in Ohio, **that in order to give a court jurisdiction in equity** to quiet title to real estate, that the party must allege and prove that he is either in actual possession

himself, or by a tenant, or lessee, or by his representative and that he has the legal title thereto. This has always been the law in Ohio. If he is out of possession then the courts in Ohio and the United States have held that he must file an action in ejectment. If he claims as reversioner or remainderman then he can file an action to quiet title if out of possession. But if as stated in 57 O. S., 287-288, Raymond v. Ry. Company, page 43-46, the party claims the entire legal title and interest present and prospective, then his only right of action is at law in ejectment.

See:

Pomeroy Eq. (3rd Ed.), Sec. 1395;
Clark v. Hubbard, 8 Ohio, 382;
Douglas v. Scott, 2 Ohio, 194;
Lowery v. Lowery, 4 Ohio, 77;
Marsh v. Reed, 10 Ohio, 384;
Harris v. Paul, 37 Ohio App., 206, 174 N. E., 615.

Counsel for respondents certainly are charged with knowledge that this was the settled law in Ohio when they made an effort to convince this court that the petition as against them was an action in equity to quiet title.

That this Honorable Court follows the Ohio rule is evident from the following:

> "Under the jurisdiction and practice in equity, independently of statute, the object of a bill to remove a cloud upon the title, and to quiet the possession of real estate, is to protect the owner of the legal from being disturbed in his possession or harrassed by suits in regard to that title, and the bill cannot be maintained without clear proof of both possession and legal title in plaintiff. Alexander v. Pendeeton, 8 Cranch, 462; Elliott v. Piersol, 6 Pet., 95 * * * as observed by Mrs. Justice Grier in Ortan v. Smith,

18 How., 263. Those only who have a clear legal and equitable title to land, connected with possession have any right to claim the interference of a court of equity to give them peace or dissipate a cloud on the title. 18 How., 265. A person out of possession cannot maintain such a bill whether his title is legal is remedy at law by action in ejectment is plain, adequate and complete; and if his title is equitable, he must acquire the legal title and then bring ejectment. U. S. v. Wilson, 118 U. S., 86; Tussel v. Gregg, 113 U. S., 550."

Frost v. Spitley, 121 U. S., 552, 556.

"Where a party had an action in ejectment, the court declared that equity was without jurisdiction of a suit to determine the rights of the parties, the remedy at law being complete and adequate."

Syl. 3. Whiteside v. Nortan, 205 Fed., 5, 13.

The last paragraph of the judgment entry of the Court of Appeals (appendix), proves our contention that **the possession** of the specific real property was the crux of the action, when after dismissing plaintiff's petition and the cross petition of Mary Meyer it goes on to say:

"* * * that the defendant-appellants and other heirs and/or devisees of the said Grace D. Murnan be **restored to the possession** of the seventeen parcels of real estate described in the petition, **of which they were deprived by the judgment of the Common Pleas Court herein**, and that they have an accounting for all the rents and profits of which they were deprived by said judgment appealed from." (Appendix.)

However, respondents cite the case of Clark v. Clark, 110 Ohio State, 644, on the question of an action to quieting title, but fail to cite the third syllabi which is as follows:

"3. When the initial proceeding is statutory and not equitable, one defendant may not, by filing against another defendant a cross-petition which

states a chancery case, convert the whole proceeding into a chancery case."

Clark v. Clark, 110 Ohio State, 644.

But the answers in the case at bar **did not change the sole primary issue, i. e. the recovery of the possession at law of real estate,** respondents admit this when they say:

"Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition." (Respondents' brief, page 13.)

The opinion of the court in the Clark case, supra, sustains our position.

Furthermore it is claimed if the action is legal and not appealable that there was a waiver and that the court had jurisdiction to try a strictly legal action as a cause in chancery and they cite in support of that contention the case of Wagner v. Armstrong, 93 O. S., 443, but fail to cite the first syllabus which is as follows:

"1. Section 12225, General Code, purporting to vest the courts of appeals with jurisdiction in the trial of cases on appeal, is unconstitutional and void. **The jurisdiction of the courts of appeals in the trial of cases on appeal is expressly limited by the Constitution to chancery cases,** and this jurisdiction cannot be enlarged by the General Assembly." (Emphasis ours.)

Wagner v. Armstrong, 93 O. S., 443.

If the General Assembly can not enlarge this jurisdiction, it goes without saying that the court deriving its powers from the Constitution cannot do so.

It is further contended that the answers of Margaret Lunn and Mary Fallon affect the issue. Here is what petitioners say about these answers:

"There were other answers filed before and after her death but they did not alter or change **the only**

issue raised by the answer filed by Grace Backenstoe." (Petition for writ, page 5.)

Here is what counsel for respondents say about these answers:

> "* * * the joint answers of Mary Fallon and Margaret Lunn, **nieces of M. P. Murnan and named by the plaintiff as joint tenants with him, each answer merely setting forth that Grace Murnan was the widow and sole heir of M. P. Murnan and asking that the petition be dismissed.**" (Respondents' brief, pages 12 and 13.)

Significantly, we repeat, on the same page appears the following:

> "Under these answers there could be no question but that the causes of action stood as framed by the plaintiff's petition." (Respondents' brief, page 13.)

Certainly, if the plaintiff's petition stated a cause of action at law to recover the possession of specific real property, no matter what he called it, all of the answers that were filed did not change the sole issue raised by the answers filed by Grace Backenstoe.

It is a part of the settled course of judicial proceedings in Ohio, that if a petition contains more than one cause of action, one legal and the other equitable, co-mingled, that such a situation is a mere irregularity and is not fatal to the rights of the parties, and that the only way to attack the irregularity, is by motion, not demurrer. Township of Hartford v. Bennett, 10 O. S., 441.

It is further a part of the settled course of judicial procedure in Ohio, that where there are two causes of action stated, one legal and the other equitable, the one which will control the rights of the parties and extinguish the other, if successful, is the primary action and the other secondary; what is the primary action is to be de-

termined by the issue made up by the pleadings of the parties; that if the primary action is legal that then an appeal at law only lies and such appeal does not carry up or open up the equitable action and vice versa; that whether a case is legal or equitable does not, as contended by respondents, depend on the understanding of counsel, or of the trial court, nor upon the form of the judgment rendered but upon the nature of the action as shown by the pleadings.

See

Raymond v. Ry. Co., 57 O. S., 271, 282, 289; page 43, our brief.
Salliday v. Webb, 2 O. C. C., 553; 20 C. D., 638.
Buckner v. Mear, 26 O. S., 514.
Ladd v. James, 10 O. S., 438.
James v. West, 67 O. S., 28, 49.
Carpenter v. Warrner, 38 O. S., 614.
McHenry v. Carson, 41 O. S., 212, 224.
Leach v. Clurd, 10 O. S., 149.
Albright v. Hawk, 52 O. S., 363.
Ireland v. Chenney, 129 O. S., 527, page 48, our brief.
Wall v. Federation Co., 121 O. S., 334, 337, page 45, our brief.

The respondents make a claim that the federal question presented by the petitioners in the state courts and which was denied there is not a question of substance. They also contend that the federal question does not control the judgment of the state courts. On account of the allegations contained in our petition and the state of the record, we believe it is sufficient to call this court's attention on this point to the following cases:

South Pacific v. Shuyler, 227 U. S., 601, 611.
Levering and Co. v. Morrin, 289 U. S., 103, 105.
Greenbay v. Patton, etc., 172 U. S., 58, 68.
Morris v. Gilmer, 129 U. S., 315, 326.
Blyth v. Henckley, 180 U. S., 333-337.

R. R. Co. v. Maryland, 87 U. S., 643.
Ward v. Board, 253 U. S., 17, 22, and
Carlson v. State of Washington, 234 U. S., 103, 106, from which we quote. This was a case where one of the assignments of error was the refusal of the Supreme Court to find a fact, which the party deemed material and essential to the federal register:

> "While, in ordinary cases, we are bound by the findings of the state court of last resort respecting matters of fact, it is hardly necessary to say that that court cannot, by omitting to pass upon the basic questions of fact, deprive a litigant of the benefit of a federal right, any more than it could do so by making findings that were wholly without support in the evidence. And just as this court, where its appellate jurisdiction is properly invoked and all the evidence is brought before it, will, if necessary for a decision of a federal question, examine the entire record in order to determine whether there is evidence to support the findings of the state court, so it is our duty, in the absence of adequate findings, to examine the evidence in order to determine what facts might reasonably be found therefrom, and which would furnish a basis for the asserted federal right. Southern P. Co. v. Schuyler, 227 U. S., 601, 611, 57 L. Ed., 662, 669, 43 L. R. A. (N. S.), 901, 33 Sup. Ct. Rep., 277, and cases cited."
>
> Carlson v. State of Washington, 234 U. S., 103.

As to the contention that the Court of Appeals being a court of general appellate jurisdiction and a court of record, it should be noted that is not true.

Its jurisdiction is specifically limited and defined by the Constitution since 1912. Before 1912 it had general appellate jurisdiction of all cases conferred by statute. The cases cited by respondents are cases decided before 1912.

From the case of Harris v. Hardeman we quote the following:

> "If as contended that defendant is estopped from pleading matter against the record * * * because it imparts verity.
>
> It appears to me that this proposition assumes the very fact to be established which is the only question in issue. For what purpose does the defendant question the jurisdiction of the court? Solely to show that its judgment and proceedings are void, and therefore, the supposed record is no record. * * *
>
> Unless a court has jurisdiction it can never make a record which imparts uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not to therefore be estopped from proving any fact which goes to establish the truth of the plea alleging the want of jurisdiction."
>
> Harris v. Hardeman, 14 Howard, 334, 341.

Under U. S. v. Walter, 109 U. S., 258, 266, citing Bigelow v. Forrest, Ex parte Lange, 18 Wall., 163, Windsor v. McVeigh, the court said:

> "Although a court may have jurisdiction over the parties and the subject matter, yet if it makes **a decree which is not within the powers granted to it by law of its organization, its decree is void.**"
>
> U. S. v. Walter, 109 U. S., 258, 266.

This should be sufficient answer to the claim that because the Court of Appeals by Constitution in a proper case, has jurisdiction on appeal de novo of a chancery case, that any litigant can appeal any case to it and that the court, **may by arbitrary action,** hear the case as a chancery case, **even though the record shows it is exclusively a law case.**

We believe that all other questions presented by the brief of respondents is, for the purpose of the petition,

sufficiently stated in our opening brief and petition. We further believe that the jurisdiction of this court to hear and determine this case is fully established under the petition and that the writ should be allowed.

Respectfully submitted,

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